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SUBJECT The Secrecy Issue

ROBERT MACNEIL: Tonight, the secrecy issue: Should government tighten its rules to protect the nation's secrets?

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MACNEIL: Watergate and reaction to the Vietnam War caused something of a rush to make the United States Government less secretive. Under President Carter, the philosophy was: If in doubt whether publishing a fact will harm national security or not, then publish it. Now critics say the Reagan Administration is reversing that philosophy to: When in doubt, keep it secret.

The Administration has proposed tightening up the Freedom of Information Act to exempt the Central Intelligence Agency. It has proposed upgrading the classification of documents; in effect, to make more documents secret. It has abolished the public affairs office through which the CIA explained its actions to the public. It has restricted the freedom of government officials to talk to the press. And the White House has lent its support to legislation, now nearing final passage in Congress, making it illegal to reveal some classified information or disclose the names of CIA agents.

Tonight, where does all this lead, and how much secrecy is enough?

JIM LEHRER: Robin, one of the major supporters of the push to tighten up is Jack Maury, President of the Association of Former Intelligence Agents. Mr. Maury was Assistant Secretary of Defense for Legislative Affairs in the Ford Administration, and before that spent 28 years as a Central Intelligence Agency

officer specializing in Soviet affairs.

Mr. Maury, why should more government information be classified now?

JACK MAURY: A lot of it should be, I think, on a selected basis. Because, as we all know, in many cases information has been overclassified. But now, particularly, when the KGB is more aggressive and has a bigger appetite than ever, when high technology is hemorrhaging badly and getting into Soviet hands, saving them a lot of money, giving them advantage in many fields of military application. And also it's important, I think, to maintain a high degree of secrecy in the diplomatic area, as well as the military. And certainly in the intelligence area, you can't run intelligence operations without the protection of a very high degree of secrecy.

LEHRER: Is the protection not there now in the law?

MAURY: Well, it is...

LEHRER: ...executive order that's now in effect?

MAURY: The executive order and the law both leave a good deal to be desired, in my judgment. To give you an example of the law, we still don't have any legislation to protect the identities of our personnel or sources and methods in the intelligence business. Meanwhile, you've got legislation protecting estimates on next year's soybean crop in the Department of Agriculture which carries a severe criminal penalty. So I think we've gone too far in some directions, perhaps, and not far enough in others.

But in the area of national security and foreign affairs, I think there are a lot of rat holes that need to be plugged up.

LEHRER: Do you think that the situation is serious, that information is getting out now into Soviet and other hands that is damaging our national security?

MAURY: I don't have any doubt about that. As a matter of fact, a Soviet intelligence officer walked into the General Accounting Office recently and walked out with 40,000 pages of documents of various levels of importance and sensitivity, in terms of technology which would be worth a great deal to the Soviets, I'm sure, in military weaponry and whatnot.

LEHRER: And your view is that that kind of information should be tightened up and that kind of information should be classified so that KGB agent can't do that. Right?

MAURY: I agree.

LEHRER: What about the other issue, or one of the other issues, about the CIA being exempted from the Freedom of Information Act? Why should that happen?

MAURY: Well, I think there are two reasons. First of all, the purely bureaucratic one. Last year the CIA spent 141 man-days -- I'm sorry -- man-years, at a cost of over $4 million, in processing Freedom of Information Act litigation.

Now, it's true that there is no obligation to release information if you can demonstrate that it is still sensitive. But, unfortunately, the people that are processing that information are very poorly equipped to make that judgment, I think. Because often in dealing with sensitive espionage cases, only the people who are actually involved in those cases are qualified to make the judgment. And now those people are mostly retired.

So, I think a lot of material is getting out under Freedom of Information. Even Soviet personnel, foreigners, aliens, criminals, anybody can start litigation in that area.

LEHRER: So rather than take a chance on something going through because of inexperienced hands or whatever, the thing to do is just not allow CIA information out at all...

MAURY: To me, that would be the ideal solution.

LEHRER: Thank you.

MACNEIL: The trend towards more secrecy is strongly opposed by a former government official who was himself a victim of government anxiety about security leaks. He is Morton Halperin, a senior official in the National Security Council under Henry Kissinger. Halperin sued the government after the disclosure that his own telephone had been tapped. He now heads the Center for National Security Studies.

Mr. Halperin, what's your concern about this trend?

MORTON HALPERIN: My concern is that the government is moving towards keeping more and more information secret, that the CIA is seeking to be exempt from the Freedom of Information Act, which we've used to learn about government abuses -- CIA spying on Americans, for example -- that the President is trying to tighten up the executive order on classification, which will make it more difficult to get information released under the Freedom of Information Act and will send a signal to bureaucrats to keep more information secret. And I think this trend is harmful both to national security and to the public right to know.

It's harmful to national security because, as Justice Stewart put it in the Pentagon Papers case, when you try to keep everything secret, then nothing is secret. The way to protect genuine secrets is not to try to protect things that do not require protection.

And second, it's harmful to public debate because it's going to deny the public the information that it needs to fully participate in debating foreign policy and defense issues.

MACNEIL: Well, what about the point we just heard Mr. Maury make, and which the Administration believes: that with a much more aggressive Soviet Union, KGB intelligence agents here, there are, as he put it, a lot of rat holes that need to be covered because valuable information damaging to the nation is getting out?

HALPERIN: The information that's damaging to the nation that's gotten out has gotten out in two ways. One, through spies, the recruitment of spies by the Soviet Union. And that has led to the release of some very sensitive information for the past few years, and I think suggests that we need to do more to deal with the problem that enables the Soviet Union to do that. That has nothing to do with the Freedom of Information Act or the executive order on classification.

MACNEIL: In other words, more secrecy won't make it more difficult for the Soviets to recruit spies.

HALPERIN: That's right. Nor will it stop the problem of leaks -- that is, of unauthorized disclosure of information, which is properly classified, by government bureaucrats who are fighting their political battles by leaking information to the press.

Those are the two main sources of information getting out that should not be made public.

MACNEIL: Do you think no tightening up is necessary?

HALPERIN: No. I think, in fact, we need to go further in making it easier to get information under the Freedom of Information Act and easier to get information through the executive order.

I think the CIA does need some relief in the area of review of materials which they're not going to make public. And I think there are some administrative changes that could be made.

MACNEIL: You disagree so strongly with this. I mean you take a diametrically opposed view. Is that based on a -- on your different political philosophy than this Administration? Do

you think this is a political judgment they are making?

HALPERIN: No. I think it's got to do with the fact that people in the government, from whatever Administration, whatever political philosophy, always want to control what's made public. So that the CIA wants to put out that intelligence data that they think would help the Administration's position, or the President wants to put it out, but not the information that might hurt his position.

I don't think this is a matter of political parties, or even political philosophies. It's a matter of the President and others in the Executive Branch wanting to control what should be released, and people outside the government saying, "No. we want to have the right to get information whose release would not injure national security if it's important to the political debates of the day."

MACNEIL: Well, thank you.

LEHRER: On the issue of publishing the names of U.S. intelligence agents. The House has already passed a version that would prosecute those who do. The Senate may do so within the next few days. The key issue is whether a person must publish the names with the intent to damage national security in order to be prosecuted, or whether merely having reason to believe such publication would do so is enough.

It may sound like a minor difference, but it seems as major by those involved in this issue, those such as Senator Jake Garn, Republican of Utah, a member of the Senate Intelligence Committee, and Congressman Glenn English, Democrat of Oklahoma, Chairman of the House Subcommittee on Government Information and Individual Rights.

Senator, you support the "reason to believe" wording. Correct?

SENATOR JAKE GARN: I certainly do, Jim.

LEHRER: Why, Senator?

SENATOR GARN: We, first of all, must explain the problem. We have some renegade ex-CIA agents, in the form of Phil Agee, Richard Walsh -- or Wolf. Richard Walsh is an agent who was probably killed in Greece as a result of his name being exposed.

So, first of all, we are endangering hundreds of our agents to death. Secondly, we are greatly damaging our intelligence-gathering capabilities. And when we do that, when we don't know as much about what the enemy is doing, we increase defense

expenditures. So there's a cost to us, as well. Our allies don't want to cooperate with us. There's been so many disclosures. The British, they don't want to go along with that and see their agents exposed. So there's less cooperation.

So we've had very severe damage of our legitimate intelligence-gathering activities. And we've had no means of doing this, of taking care of the problem. Philip Agee has had his passport revoked. That's all we've been able to do against a traitor to this country.

Now, the difference in the House version, of reason to believe that they would harm the intelligence-gathering activities, as compared to intent, it's much more difficult to prove intent. Philip Agee could say, "My goodness, I am simply trying to help our intelligence-gathering activities by getting rid of bad agents." He's very self-righteous.

So I think it's a matter of proof. I think if we put the intent standard in, in the Senate version that is there now, we simply gut this. We go on exposing our agents to death. We go on just with a flood of information and deterioration of our intelligence-gathering activities.

It passed the Senate, 13-to-1 in the Senate Intelligence Committee. It passed the House 354-to-6. Joe Biden, my friend from Delaware, Senator Biden, lost 13-to-1 in the Senate Intelligence Committee with "reason to believe" standard. He went to the Judiciary Committee, where we had joint jurisdiction, and won 9-to-8. I think we're going to, in the Senate, we're going to add the "reason to believe standard," we're going to put some teeth in this law, and we're going to stop the Philip Agees of this world from endangering fellow Americans from their lives and endangering the security of this country.

LEHRER: Now, Congressman English, you see it differently. You want intent rather than "reason to believe." Correct?

REP. GLENN ENGLISH: That's exactly right. I think that the Senator and I, and the certainly the House and the Senate, agree that we want to see this type of activity stopped. The question is, is the best way to deal with it. And I think that, obviously, that means prosecution, and prosecution under this law.

We think that it would be much more difficult to try to determine whether a person had reason to believe that he was disclosing information that might be harmful than his actual intent. We think that, under the law, it would be much easier to prove intent. And we certainly think that the court tests that are likely to come -- in fact, are certain to come in the near future dealing with either of these two versions, it would be easier to

hold the intent.

LEHRER: Well, what about Senator Garn's that -- he used the Agee example -- that Agee could say, "Oh, well, I didn't intend to do any harm. What are you talking about"?

REP. ENGLISH: If he can convince a jury of that, I'm sure that he'll get off. And certainly if he can convince the jury that he didn't have that intent to disclose that type of information, he's going to be able to deal with the Senate version a lot easier.

LEHRER: What are the objections you have to the "reason to believe" wording? Are there dangers involved here? I've read that a lot of people say this would be a violation of the Constitution, an inhibition on the press, and all of that. Is that one of your concerns?

REP. ENGLISH: Well, one of the concerns is getting prosecution. I want to see this thing stopped. I want to see a law that's strong enough to deal with the problem. And if we're going to have to go to the Supreme Court to deal with it, I want a law that's going to stand up. I think that most of the so-called constitutional scholars that we have around the Congress would agree that the House version would be much easier to stand up in front of the Supreme Court and get approved than the Senate version.

LEHRER: Do you agree with -- you don't agree with that. Right, Senator?

SENATOR GARN: No. and I don't think that 354 of the Congressman's colleagues agree with that either. It was such an overwhelming margin in the House saying that "reason to believe" is the one that is easier to prove.

On the constitutional issue, something that hasn't been mentioned, that there are six tests that must be met. I don't think anybody who is not trying to harm the government of the United States or our intelligence-gathering activities or our agents have any fear from this law, because of other tests. First of all, that there was an intentional disclosure of information which did in fact identify a covert agent, the disclosure was made to an individual not authorized to receive classified information, that the person who made the disclosure knew that the information diclosed did in fact identify a covert agent, and three others, before we ever get to this "reason to believe" or intent. So there are plenty of constitutional safeguards in this law.

LEHRER: Well, let's take a hypthetical case. I know the so-called organized press in the country is very much opposed to the "reason to believe" question, and they raise it on the

grounds that a reporter writing a story might have no intent to damage the national security, but might have reason to believe it could damage the national security; and under this, a -- but he might be uncovering some evil deeds by an intelligence agency or intelligence agent.

What -- how does that come down for you, Congressman, on that question?

REP. ENGLISH: Well, I think that you're striking at the point. And let's clear that even one step further. Let's say that he had no reason, no knowledge whatsoever, no reason to believe that this would affect national security. Certainly, under the law, as the Senator would propose it, obviously, that person should be exempt. But how do you go into a court and prove that? Obviously, any prosecutor could go in and say, "Obviously, he had reason to believe. You know, this was classified information. Therefore, you know, he should be prosecuted."

LEHRER: If he was a good reporter, he should have known, he should know what the consequences would be.

SENATOR GARN: But the Congressman is ignoring the other five tests, classified information -- and the most key one, that I did not mention: that the disclosure was made in the course of a pattern of activities intended to identify and expose covert agents. So an Agee's been doing it over and over again. He's with a group that does it over and over again. An inadvertent error like that by a newsman certainly would not meet all the other five tests. The "reason to believe" is only one of six tests in order to get a conviction. The most important is a pattern or practice, not a single incident, not two incidents, a pattern or practice of deliberately trying to do this.

LEHRER: Thank you.

MACNEIL: Mr. Halperin, what do you think the effect would be if this intelligence identities bill were passed with the broad criterion of "reason to believe" it would damage national security?

HALPERIN: Well, I should say first that I think both versions are unconstitutional, and I don't think the Senate ought to pass either version as it relates to people who have never been government officials.

MACNEIL: Would you briefly state why you think it's unconstitutional?

HALPERIN: Because it would penalize a private citizen

who's never had access to classified information, who simply reads government documents put out officially by the United States Government, deduces from them who a covert agent may be, and then publishes that name, and it may be somebody who worked for the CIA 20 years ago in Europe. And that could be made a crime under either version of the bill. And I think either version, therefore, is unconstitutional.

But I think the "reason to believe" version is far worse. And, as has been suggested, every major press organization agrees with that. And the reason is that under the "reason to believe" standard, a reporter would go through all those other five steps, because all they are is the things that normally an investigative journalist does -- a pattern of activities, trying to learn the identities of agents, knowing that the information is classified, and so on. And a reporter could then be prosecuted for publishing a story that CIA station chiefs were engaged in illegal activities, selling weapons to terrorists, illegally spying on American citizens. While under the intent standard, the government would have to show that the disclosure was done for the purpose of impairing intelligence activities.

So I think you would at least have some protection for the press in those circumstances.

MACNEIL: Let's get the view of the former CIA official who's with us.

Mr. Maury, you, I take it, would believe that such a law, in some form, is necessary to protect the CIA.

MAURY: I would certainly agree with that. And I agree with Senator Garn that the "reason to believe" is more desirable than intent. It's analogous, in my judgment, to criminal negligence, which is a familiar legal concept. If you have reason to believe that your action may result in, say, the death of somebody from reckless driving in your car, you're criminally responsible, even though that many not have been your primary intent.

MACNEIL: Senator Garn, what do you say to those -- and I guess Mr. Halperin would be among them -- who say that if you pass either form of this law, but particularly the broad "reason to believe" one which you support, that you're going to inhibit investigative journalism and public comment about the activities of the intelligence community, which are necessary to a proper evaluation of policy decisions?

SENATOR GARN: I don't agree with that, because of the large number of tests necessary to prove this, six of them. And I don't think a reporter, investigative reporting is going to meet all of those tests. And if he did, he should be prosecuted,

in my opinion. The press can't hide behind the First Amendment to the detriment of this country. They can't -- I really have a hard time believing, Robin, that they want to be part of any operation that would kill a fellow human being or cause us to spend billions of dollars of additional money for defense, when they're constantly saying, "Cut defense."

With freedom comes some responsibility for actions. And in many of these cases -- I don't want to inhibit the press. I believe in freedom of the press. But a little responsibility ought to go along with it. Sometimes when they find out something, maybe rather than getting the scoop they simply ought to say, "This will damage my country, and that's more important not to do that than to get a byline."

MACNEIL: Congressman English, you support one version of this bill. What do you say to Mr. Halperin's observation that both forms are unconstitutional?

REP. ENGLISH: Well, I think that we've got to keep in mind that it is important to protect these agents, and certainly we don't want to jeopardize their lives.

I'm not an attorney, and I'm certainly not a constitutional expert. And I suppose that's one that the courts will have to decide. But I think that we need to take some sort of action to deal with this problem.

And let me also say that what we're coming down to here, even though it may not be said so bluntly, I think is an issue of whether or not we're lifting the CIA above public scrutiny. Obviously, any reporter who would seek to determine any type of wrongdoing within the CIA, following the "reason to believe," could be subject to prosecution. And that would, I think, certainly chill any activity among the press and among young reporters to try to publish any type of wrongdoing.

LEHRER: Mr. Maury, is that what you're suggesting, that the CIA should be above public scrutiny from the press?

MAURY: Not at all. But I think it does need some protection, for a number of reasons. First of all, because in the intelligence business, as in so many other professions, particularly in journalism, you cannot operate without the protection of your sources and your methods, and so on. Second, unless you can provide that protection, you're not going to be able to recruit people that you need to do the job. You're not going to be able to protect either the individuals or organizations, or are you going to be able to enjoy the cooperation of friendly governments unless you can assure them that you can keep the information you obtain from that relationship secret.

So you certainly do need this protection. But on the other hand, I think we've got to accept the fact that while the general public should not be privy to the inner workings of CIA, we do have now -- which we haven't had very long, but we have now -- two responsible committees of the Congress that are performing that oversight function in behalf of the public. And I think that is the solution.

LEHRER: I see.

Gentlemen, for the couple minutes we have left, back to the general question that we began with, which is the whole question of what should be secret and what should not be secret.

Senator Garn, you heard what Mr. Halperin said. He said the real problem is not the release of unauthorized documents or the things are not -- not enough things are classified, but that information is coming from spies and from leaks. Do you agree with him?

SENATOR GARN: I agree that a great deal of it has come from those sources. But we are so open in the area of national security that it's ridiculous. The Soviets have a hard time processing all they're able to glean.

But I think we ought to make a distinction, Jim. I think there's too much secrecy in government in domestic affairs, in normal government activities. And in that area, we should ease up from what we have done. Watergate was a domestic affair. There should have been no cover-up.

But when we're talking about national security, covert activity, an enemy like the Soviet Union, we need to know. And we cannot disclose our sources and methods. We would have lost World War II had we not had the intelligence that we did, that Churchill had for the Battle of Britain.

So if you're going to err on national security, err on the side of being a little bit too tough. On the other side, err on the side of being too open in domestic affairs.

LEHRER: Congressman English, what's your view, generally, on this question?

REP. ENGLISH: I think that when it comes down to a question, particularly with regard to the executive order that is being considered by the President -- when one reads that language, it is so loose, and speaking of domestic activities and national security, that one could even classify road maps and telephone books without any difficulty whatsoever in the interest of national security, simply because our national highway system, obviously, is a part of our national defense, our

national security operations. Certainly the telephone company is. So when you have an executive order that is drawn that loosely, to allow that type of activity, which does come into the domestic arena and touches every facet of technology, then, obviously, you've got a problem, a very serious problem.

President Reagan may not abuse this authority. But this law delegates far beyond just the principals. It goes down to the levels on which ordinary bureaucrats will have the authority to classify on their own.

LEHRER: Gentlemen, we have to leave it there.